

# DISPUTE RESOLUTION ALERT

## IN THIS ISSUE

### THE LAW OF CONTRACT POST THE 1996 CONSTITUTION

The judgment in *Beadica 231 CC and others v Trustees, Oregon Unit Trust and Others* 2018 (1) SA 549 (WCC) goes to the heart of the debate as to what, post the Republic of South Africa Constitution Act of 1996, constitutes the law of contract in South Africa.

# THE LAW OF CONTRACT POST THE 1996 CONSTITUTION

*The Constitutional Court nodded in the direction of a more communitarian construction of the foundational values of freedom, dignity and equality to infuse a greater degree of fairness into the law of contract.*

*The struggle to balance these competing visions can be located in the tension between individual autonomy and what, in the South African context, is generally sourced in the value of ubuntu.*

**The judgment in *Beadica 231 CC and others v Trustees, Oregon Unit Trust and Others* 2018 (1) SA 549 (WCC) goes to the heart of the debate as to what, post the Republic of South Africa Constitution Act of 1996, constitutes the law of contract in South Africa.**

The applicants were franchisees in terms of franchise agreements entered into with the second respondent for an initial period of ten years. Their businesses primarily consisted of the rental and sale of builders' equipment and tools. They were all black-owned enterprises, having acquired their businesses as part of a black economic empowerment transaction.

Pursuant to the franchise arrangements, each of the applicants concluded an agreement with the first respondent for a lease of its premises. The leases would be for an initial period of five years, with a right to renew them for a further five years, provided that the lessees exercised their renewal options at least six months prior to the initial termination date.

The lease agreements ran parallel to the franchise agreements.

The applicants did not timeously renew their leases. They did, however, albeit out of time, address correspondence to the first respondent which, so they claimed, constituted an exercise of their options to renew the lease agreements for a further five years. They contended that they were salespeople, that they were not acquainted with the intricacies and implications of the

law of contract and/or of lease and that they genuinely wished to renew the leases, as is evidenced by such correspondence.

The applicants faced the real prospect that their businesses would close and/or that their franchise agreements would be terminated if the lease agreements were not renewed.

They sought an order declaring that the said correspondence served as a valid exercise of their options to renew the lease agreements for a further period of five years.

Davis J granted the order.

He reasoned as follows.

In a series of cases culminating in *Botha v Rich NO and Others* 2014 (4) SA 124 (CC), the Constitutional Court nodded in the direction of a more communitarian construction of the foundational values of freedom, dignity and equality to infuse a greater degree of fairness into the law of contract. For this reason, the court spoke about the fact that honouring a contract cannot "be a matter of each side pursuing his or her own self-interest . . . without regard to the other party's interest".



CDH's latest edition of  
**Doing Business in South Africa**  
**CLICK HERE** to download our 2018 thought leadership

## CONTINUED

*When the tenant's bank, owing to a technical error, failed to make a month's payment, the landlord cancelled the lease, and applied for the tenant's eviction.*



The struggle to balance these competing visions can be located in the tension between individual autonomy and what, in the South African context, is generally sourced in the value of ubuntu. In this context ubuntu means that a person becomes a person through other persons, by way of a communal relationship with others.

Applicants' counsel argued that the law of contract in South Africa was now infused with constitutional values which, for the determination of this case, were not only predicated on the strict terms of the lease agreements but which also had to be examined within the broader context of the purpose behind both sets of agreements and having regard to the doctrine of good faith and fairness.

Applicants' counsel referred to the decision in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) where Moseneke DCJ said the following:

Had the case been properly pleaded, a number of interlinking constitutional values would inform a development of the common law. Indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of ubuntu, which inspire much of our constitutional compact. On a number of occasions in the past this court has had regard to the meaning and content of the concept of ubuntu. It emphasises the communal nature of society and 'carries in it the ideas of humaneness, social justice and fairness' and envelopes the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity.

In *Botha v Rich NO and Others* 2014 (4) SA 124 (CC) Nkabinde J developed this approach further:

The principle of reciprocity falls squarely within this understanding of good faith and freedom of contract, based on one's own dignity and freedom as well as respect for the dignity and freedom of others. Bilateral contracts are almost invariably cooperative ventures where two parties have reached a deal involving performances by each in order to benefit both. Honouring that contract cannot therefore be a matter of each side pursuing his or her own self-interest without regard to the other party's interests. Good faith is the lens through which we come to understand contracts in that way.

Davis J referred to *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2017 (4) SA 243 (GJ) as a recent application of the dicta in *Everfresh*. In such case, the applicant landlord and respondent tenant's lease provided that if the tenant failed to pay a month's rent by its due date, the landlord could cancel the agreement and repossess the property. When the tenant's bank, owing to a technical error, failed to make a month's payment, the landlord cancelled the lease, and applied for the tenant's eviction. The issue was whether the cancellation clause should be enforced. The court held that, given the prejudice that would result to the tenant and where the blame for the default lay, to enforce the clause would offend the constitutional values of ubuntu and fairness. The court dismissed the application.

# THE LAW OF CONTRACT POST THE 1996 CONSTITUTION

*The judge said that the Constitution demands an audit of all law and that such demand cannot be defended by the idea that legal certainty will be compromised.*



Back to the case before him, Davis J found that, if the lease agreements were cancelled, the franchise agreements would not have effect and the applicants' businesses would collapse. The vitally important initiative designed to encourage ownership of business by historically disadvantaged people would be dealt a blow, and a vital one for these applicants. If their application failed, they would lose their businesses.

Davis J said that the case really turned on the question as to whether the applicants complied strictly with the provisions of the lease or whether in substance they did comply.

According to the judge, there could be little doubt that, when the contracts were concluded, the parties envisaged that the franchise agreements would endure for ten years, that the applicants' businesses would be in the leased premises and that after five years they would have a right to renew their leases. The two sets of agreements were inextricably tied, one to the other.

Davis J said that, if honouring a contract was not merely a matter of each side pursuing his or her own self-interest above the other party's interest, and if that is not the exclusive lens through which our contract law should be evaluated, then, in order to promote a more nuanced focus, it must follow that the relief sought by applicants should be granted.

Davis J addressed the contention that such a conclusion would undermine legal certainty, in particular, the problem of

enforcement of contractual obligations being dependent upon a judicial sense of reasonableness, fairness and good faith rather than in terms of a contract.

The judge said that the Constitution demands an audit of all law and that such demand cannot be defended by the idea that legal certainty will be compromised. The journey to legal change may cause understandable anxiety but, if honestly managed, it will introduce a rule of law for the protection of 55 million South Africans without the detrimental consequences suggested.

The judge was of the view that, in the vast majority of cases, the approach adopted by him in this dispute on its specific facts will not necessarily be followed, "where the consequence of a breach is so reasonably foreseen and the remedy is appropriate".

But in this instance the respondents did not do enough to justify their opposition to the applicants' case. The very idea of the transaction was, firstly, to promote the interests of historically disadvantaged applicants to participate fully in the economy and, secondly, to embrace them, not only as political, but as economic citizens. The respondents contended that the applicants (who did not have the requisite business knowledge) should have requested a renewal of their leases in a more precise form and within the specified dates. In the circumstances of this case, these contentions were insufficient to justify their opposition to the relief sought by the applicants.

*Marius Potgieter*

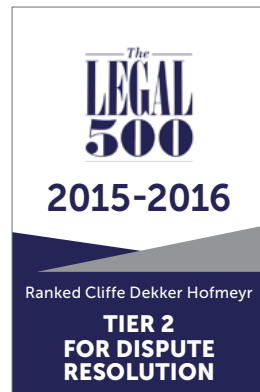



**CLICK HERE** to find out more about our Dispute Resolution practice.



# Best Lawyers 2018 South Africa

## NAMED CDH LITIGATION LAW FIRM OF THE YEAR

- CHAMBERS GLOBAL 2017 - 2018 ranked our Dispute Resolution practice in Band 1: Dispute Resolution.
- CHAMBERS GLOBAL 2018 named our Corporate Investigations sector as a Recognised Practitioner.
- CHAMBERS GLOBAL 2018 ranked our Dispute Resolution practice in Band 2: Insurance.
- CHAMBERS GLOBAL 2018 ranked our Dispute Resolution practice in Band 2: Media & Broadcasting.
- CHAMBERS GLOBAL 2017 - 2018 ranked our Dispute Resolution practice in Band 2: Restructuring/Insolvency.
- Janet MacKenzie ranked by CHAMBERS GLOBAL 2018 in Band 3: Media & Broadcasting.
- Julian Jones ranked by CHAMBERS GLOBAL 2017 - 2018 in Band 3: Restructuring/Insolvency.
- Tim Fletcher ranked by CHAMBERS GLOBAL 2018 in Band 4: Dispute Resolution.
- Pieter Conradie ranked by CHAMBERS GLOBAL 2012 - 2018 in Band 1: Dispute Resolution.
- Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2017 - 2018 in Band 2: Dispute Resolution.
- Joe Whittle ranked by CHAMBERS GLOBAL 2016 - 2018 in Band 4: Construction.

## OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:



**Tim Fletcher**  
National Practice Head  
Director  
T +27 (0)11 562 1061  
E tim.fletcher@cdhlegal.com



**Thabile Fuhrmann**  
Chairperson  
Director  
T +27 (0)11 562 1331  
E thabile.fuhrmann@cdhlegal.com

**Timothy Baker**  
Director  
T +27 (0)21 481 6308  
E timothy.baker@cdhlegal.com

**Roy Barendse**  
Director  
T +27 (0)21 405 6177  
E roy.barendse@cdhlegal.com

**Eugene Bester**  
Director  
T +27 (0)11 562 1173  
E eugene.bester@cdhlegal.com

**Tracy Cohen**  
Director  
Business Development  
T +27 (0)11 562 1617  
E tracy.cohen@cdhlegal.com

**Lionel Egypt**  
Director  
T +27 (0)21 481 6400  
E lionel.egypt@cdhlegal.com

**Jackwell Feris**  
Director  
T +27 (0)11 562 1825  
E jackwell.feris@cdhlegal.com

**Anja Hofmeyr**  
Director  
T +27 (0)11 562 1129  
E anja.hofmeyr@cdhlegal.com

**Julian Jones**  
Director  
T +27 (0)11 562 1189  
E julian.jones@cdhlegal.com

**Tobie Jordaan**  
Director  
T +27 (0)11 562 1356  
E tobie.jordaan@cdhlegal.com

**Corné Lewis**  
Director  
T +27 (0)11 562 1042  
E corne.lewis@cdhlegal.com

**Janet MacKenzie**  
Director  
T +27 (0)11 562 1614  
E janet.mackenzie@cdhlegal.com

**Richard Marcus**  
Director  
T +27 (0)21 481 6396  
E richard.marcus@cdhlegal.com

**Burton Meyer**  
Director  
T +27 (0)11 562 1056  
E burton.meyer@cdhlegal.com

**Zaakir Mohamed**  
Director  
T +27 (0)11 562 1094  
E zaakir.mohamed@cdhlegal.com

**Rishaban Moodley**  
Director  
T +27 (0)11 562 1666  
E rishaban.moodley@cdhlegal.com

**Byron O'Connor**  
Director  
T +27 (0)11 562 1140  
E byron.oconnor@cdhlegal.com

**Ashley Pillay**  
Director  
T +27 (0)21 481 6348  
E ashley.pillay@cdhlegal.com

**Lucinde Rhoodie**  
Director  
T +27 (0)21 405 6080  
E lucinde.rhodie@cdhlegal.com

**Willie van Wyk**  
Director  
T +27 (0)11 562 1057  
E willie.vanwyk@cdhlegal.com

**Joe Whittle**  
Director  
T +27 (0)11 562 1138  
E joe.whittle@cdhlegal.com

**Pieter Conradie**  
Executive Consultant  
T +27 (0)11 562 1071  
E pieter.conradie@cdhlegal.com

**Willem Janse van Rensburg**  
Executive Consultant  
T +27 (0)11 562 1110  
E willem.jansevanrensburg@cdhlegal.com

**Nick Muller**  
Executive Consultant  
T +27 (0)21 481 6385  
E nick.muller@cdhlegal.com

**Marius Potgieter**  
Executive Consultant  
T +27 (0)11 562 1142  
E marius.potgieter@cdhlegal.com

**Jonathan Witts-Hewinson**  
Executive Consultant  
T +27 (0)11 562 1146  
E witts@cdhlegal.com

**Nicole Amoretti**  
Professional Support Lawyer  
T +27 (0)11 562 1420  
E nicole.amoretti@cdhlegal.com

### BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

### JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

### CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

©2018 2517/JULY

